Re Kanawagi s/o Sepurumaniam; ex parte Penang Port Commission

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 29–6045–12 OF 2011
AZIZAH NAWAWI JC
30 MAY 2013

Bankruptcy — Interest — Calculation of interest — Interest on debts — Dispute over date when interest became due — Whether bankruptcy notice valid — Interest allowed was 8%pa — Interest claimed was for period of 14 years and nine months — Whether interest claim time-barred

Bankruptcy — Limitation — Bankruptcy proceedings — Validity of bankruptcy notice — Interest allowed was 8%pa — Interest claimed was for period of 14 years and nine months — Whether interest claim time-barred — Whether bankruptcy notice in violation of s 6(3) of the Limitation Act 1953

On 5 September 2008, the Court of Appeal had (*Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686), inter alia, ordered the plaintiff ('the judgment debtor' ('JD')) to refund to the defendant the sum of RM2,274,151.42 with interest at 8%pa with effect from 28 February 1997 to the date of realisation. The JD was duly served with the court order on 13 November 2008 but the JD failed to refund the said sum to the judgment creditor ('JC'). Subsequently, a bankruptcy notice ('BN') was issued against the JD. The JD filed to set aside the BN and to stay all proceeding in the bankruptcy action ('encl 20') but the application was dismissed. Hence, this appeal against the said decision. The JD submitted that: the BN was invalid in law as the interest claimed in the BN was time-barred under s 6(3) of the Limitation Act 1953; and that the BN was invalid as it was premised on a judgment of the Court of Appeal which was null and void as it contravened art 121(1B)(a) of the Federal Constitution.

Held, dismissing the appeal with costs:

(1) The interest of RM2,692,595.28 calculated from 28 February 1997 to 13 December 2011 merged into the judgment sum and the date the interest became due was the date of judgment, which is 5 September 2008. The six years limitation period ran from 5 September 2008 and expired on 4 September 2014. Since the BN was issued on 13 December 2011, the interest claimed was still within the six year limitation period. Therefore the BN dated 13 December 2011 was not invalid (see para 15).

(2) The court was bound by the judgment of the Court of Appeal dated 5 September 2010. The court did not have the jurisdiction to ascertain whether a judgment of a superior court was null and void. It was clearly misconceived for the JD to attack the judgment of the Court of Appeal in order to avoid the repercussions arising from the BN. He could have avoided these bankruptcy proceedings if he had just paid back the taxpayers' money (see para 24).

[Bahasa Malaysia summary

Pada 5 September 2008, Mahkamah Rayuan telah dalam kes (*Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686), antara lain, memerintahkan plaintif ('penghutang penghakiman' ('PP')) untuk memulangkan kepada defendan wang sejumlah RM2,274,151.42 dengan faedah pada 8% setahun berkuat kuasa dari 28 Februari 1997 sehingga tarikh realisasi. PP telah diserahkan dengan perintah mahkamah pada 13 November 2008 tetapi PP gagal untuk memulangkan jumlah tersebut kepada pemiutang penghakiman ('PK'). Kemudiannya, notis kebankrapan ('NK') dikeluarkan terhadap PP. JD difailkan untuk mengetepikan NK tersebut dan untuk menangguhkan kesemua prosiding di dalam tindakan kebankrapan ('lampiran 20') tetapi permohonan ditolak. Maka, rayuan ini terhadap keputusan tersebut. PP berhujah bahawa: NK adalah tidak sah dari segi undang-undang memandangkan faedah yang dituntut di dalam NK adalah dihalang masa di bawah s 6(3) Akta Had Masa 1953; dan NK tersebut adalah tidak sah kerana ia didasarkan atas penghakiman Mahkamah Rayuan yang mana adalah batal dan tak sah kerana ia bertentangan perkara 121(1B)(a) Perlembagaan Persekutuan.

Diputuskan, menolak rayuan dengan kos:

(1) Faedah RM2,692,595.28 dikira dari 28 Februari 1997 sehingga 13 Disember 2011 bergabung dalam jumlah penghakiman dan tarikh apabila faedah perlu dibayar adalah tarikh penghakiman, yang mana adalah 5 September 2008. Tempoh had masa enam tahun bermula dari 5 September 2008 dan tamat pada 4 September 2014. Memandangkan NK tersebut dikeluarkan pada 13 Disember 2011, faedah yang dituntut adalah masih dalam tempoh had masa enam tahun. Oleh itu NK bertarikh 13 Disember 2011 adalah sah (lihat perenggan 15).

(2) Mahkamah diikat oleh penghakiman Mahkamah Rayuan bertarikh 5 September 2010. Mahkamah tidak mempunyai bidang kuasa untuk memastikan sama ada penghakiman mahkamah lebih tinggi adalah terbatal dan tak sah. Adalah jelas salah tanggap untuk JD membidas penghakiman Mahkamah Rayuan untuk mengelak akibat-akibat yang berbangkit daripada NK. Dia boleh mengelak daripada prosiding kebankrapan ini jika dia membayar balik wang pembayar cukai (lihat perenggan 24).]

Notes

For cases on calculation of interest, see 1(2) *Mallal' Digest* (4th Ed, 2012 Reissue) paras 3064–3066.

Cases referred to

Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686, CA (refd)

Perwira Affin Bank Ltd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (folld)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385; [2002] 2CLJ 413, FC (folld)

Legislation referred to

Federal Constitution art 121(1B)(a)

Limitation Act 1953 s 6(3)

Nicholas Tan (Lim Huck Aik & Co) for the judgment creditor.
Judgment debtor in person.

Azizah Nawawi JC:

APPLICATION

[1] Enclosure (33) is an appeal against the decision of the learned senior assistant registrar ('SAR') dismissing the application of the judgment debtor ('the JD') in encl (20), to set aside the bankruptcy notice and to stay all proceeding in the bankruptcy action.

THE BACKGROUND FACTS

[2] On 5 September 2008, the Court of Appeal in W-02–715 of 2001 (*Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686), amongst others, made the following order:

> (3) the plaintiff (*the JD herein*) is to refund to the defendant the aforesaid sum of RM2,274,151.42 with interest at 8%pa with effect from 28 February 1997 to the date of realisation …

[3] The JD was duly served with the court order on 13 November 2008. Despite repeated demands, the JD failed to refund the said sum to the JC.

[4] A bankruptcy notice ('BN') dated 13 December 2011 was issued against the JD and served via substituted service. On 27 April 2012, the JD filed encl (20) to set aside the bankruptcy notice and to stay all proceeding in the

bankruptcy action. Enclosure 20 was dismissed on 20 December 2012 by the learned SAR, hence this appeal against the said decision.

THE GROUNDS OF APPEAL

[5] In his written submission, the JD relied on two grounds, that is:

(a) the BN is invalid in law as the interest claimed in the BN is time barred under s 6(3) of the Limitation Act 1953; and

(b) that the BN is invalid as it is premised on a judgment of the Court of Appeal which is null and void as it contravene art 121(1B)(a) of the Federal Constitution.

THE FINDINGS OF THE COURT

Issue (a) that the BN is invalid in law as the interest claimed in the BN is time barred under s 6(3) of the Limitation Act 1953

[6] It is the submission of the JD that BN is invalid in law as the interest claimed in the BN is time barred under s 6(3) of the Limitation Act 1953. The BN is premised on judgment of the Court of appeal dated 5 September 2008 which allows interest on the judgment sum at 8%pa with effect from 28 February 1997 to the date of realisation. The JD submits that from 28 February 1997 to the date of issuance of BN on 13 December 2011, the interest claimed is for a period of 14 years and nine months. This, according to the JD, is in violation of s 6(3) of the Limitation Act 1953 and he relied on Federal Court cases, *Perwira Affin Bank Ltd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 and *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2CLJ 413.

[7] Section 6(3) of the Limitation Act 1953 provides that:

> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment becomes enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[8] In *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin*, the question posed before the Federal Court is:

What is the proper construction of section 6(3) of the Limitation Act 1953 (hereinafter 'the Act'), in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'?

[9] In answering this question, Justice Abdul Malek Ahmad FCJ held at p 398 (MLJ); p 428/e–f (CLJ):

> To answer the question posed, we would recapitulate by saying that in view of the wording of the second limb of s 6(3) of the Act, the act of recovery must be made within six years of the judgment date and only up to the date of recovery.

[10] Two years later, the Federal Court in *Perwira Affin Bank Ltd v Lim Ah Hee @ Sim Ah Hee* agreed with the decision in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin*, where Justice Abdul Hamid Mohamad FCJ held at p 267 (MLJ); p 803/f–g (CLJ):

> In the circumstances I would answer the first question posed to this court in the affirmative ie, s 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within twelve years of the date of judgment, *arrears of interest may only be claimed for a period of six years from the date of the judgment.* (Emphasis added.)

[11] The next question then is whether the arrears of interest in the present BN exceed the six years limitation imposed by s 6(3) of the Limitation Act 1953. The JD submits that the calculation starts from 28 February 1997 (the date specified by the Court of Appeal) to the date of issuance of BN on 13 December 2011, a period spanning over 14 years and nine months, which is clearly beyond the six years limitation period.

[12] However, if we read the judgments of both the Federal Courts in *Perwira Affin Bank Ltd v Lim Ah Hee* and *UMBC v Ernest Cheong Yong Yin*, both courts have held that any pre-judgment interests or any other interest merged into the judgment debt, and therefore the date the interest becomes due is the date of the judgment, not any earlier date. In *UMBC v Ernest Cheong Yong Yin*, the court said at p 398 (MLJ); p 428/d (CLJ):

> The Court of Appeal had decided that 'the date on which the interest became due' was the date of the breach which would be before the judgment date. We are of the considered view that this finding is erroneous as the arrears of the interest are in respect of a judgment debt, which as we have stated earlier is the principal sum and the prejudgment interest, and *so the date on which the interest on the judgment debt became due must surely mean the judgment debt.* (Emphasis added.)

[13] Subsequently in *Perwira Affin Bank Ltd v Lim Ah Hee*, Justice Abdul Hamid Mohamad FCJ held at pp 267–268 (MLJ); p 804 (CLJ):

> What about the interest claimed?
>
> … A few things need to be said about this part of the judgment. First, the learned judge took the date from which the interest was calculated (1 December 1985) and not the date of the judgment (23 October 1987) as the date of interest became due. In view of the judgment of this court in *Ernest Cheong* which was followed by this court in *Moscow Narodny Bank Ltd*, with respect, that is not correct. *(Those cases held, and I agree, that regarding interest before judgment, the date the interest became due is the date of judgment. The interest merged with the judgment sum).*
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> Secondly, the learned judge calculated the period of limitation from the date the interest was calculated in the judgment (1 December 1985) to the date of the judgment (23 October 1987). In view of the two judgments of this court just mentioned, with respect, that too is not correct. *(As decided in Ernest Cheong, the period is to be calculated from the date of judgment to the date of filing the bankruptcy notice (eight years and five months after date of judgment).*
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> …
>
> *The date of judgment is 23 October 1987. Interest may only be claimed for a period of six years from the date of judgment, ie, until and including 22 October 1993.* But the claim was made until 28 March 1996 (the date the bankruptcy notice was filed) which is clearly more than six years. So the arrears of interest claimed contain arrears of interest outside the period of six years allowed ie, two years and five months more than allowed. Thus, following *Ernest Cheong* renders the bankruptcy notice invalid.

[14] The BN in the present case reads:

Jumlah Perintah	RM2, 274,151.42
Tambah faedah pada kadar 8% setahun ke atas RM2,274,151.42 dari 28/02/1997 sehingga 13/12/2011	RM2,692,595.28
Jumlah yang masih terhutang pada 13/12/2011	RM4, 966,746.70

[15] Following the reasoning of the Federal Courts in the cases above, the interest of RM2,692,595.28 calculated from 28 February 1997–13 December 2011 merged into the judgment sum and the date the interest became due is the date of judgment, which is 5 September 2008. The six years limitation period runs from 5 September 2008 and expires on 4 September 2014. Since the BN was issued on 13 December 2011, the interest claimed is still within the six year limitation period. Therefore the BN dated 13 December 2011 is not invalid.

Issue (b) whether the BN is invalid as it is premised on a judgment of the Court of Appeal which is null and void as it contravene art 121(1B)(a) of the Federal Constitution

[16] The next issue raised by the JD is that the BN is invalid as it is premised on a judgment of the Court of Appeal which is null and void as it contravene art 121(1B)(a) of the Federal Constitution. The JD submits that he won a case for wrongful termination in the High Court, and damages was assessed at RM2,274,151.42, which was duly paid by the JC. When the JC did not reinstate the JD to his former post, the JD filed an originating summons to compel the reinstatement, which was granted by the High Court. On appeal, the decision was reversed by the Court of Appeal, hence the judgment dated 5 September 2011, which forms the basis of the BN. The JD says that the judgment dated 5 September 2011 is null and void as the court cannot ordered the JD to pay back the judgment sum awarded in the earlier suit.

[17] However, having read the judgment of the Court of Appeal as reported in *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686, the factual matrix involving the JD and the JC is not as simplistic as the JD tried to make it. From the report, the JD obtained summary judgment in S6–22–208 of 1987 for a declaration that the JD's termination of employment on 7 May 1987 was null and void and for damages. An appeal was filed against the summary judgment (W-02–252 of 1994 — summary judgment appeal) Damages was assessed at RM2,274,151.42. An appeal filed against the assessment was not heard. The JD initiate garnishment proceedings against the JC and The JC paid the sum RM2,274,151.42. The JC also filed an appeal in W-03–16 of 1994 (the damages appeal).

[18] On 26 February 1997, the Court of Appeal (Coram 1) allowed the 'summary judgment appeal', set aside the declaratory order and set the case for early trial. On 27 February 1997, the Court of Appeal (Coram 1) also allowed the JC's damages appeal, and the assessment of damages was set aside.

[19] On 1 August 2001, the JD managed to get the Court of Appeal (Coram 2) to vary the orders granted by Coram 1. The JC obtained leave from the Federal Court to decide on the issue of whether Coram 2 has any jurisdiction to set aside an order made earlier by Coram 1. The Federal Court held that Coram 2 has no jurisdiction to set aside the orders made by Coram 1. Hence Coram 1 decision that the Suit S6–22–208 of 1987 proceed for trial was affirmed.

[20] But before S6–22–208 of 1987 went for hearing, the JD filed another Originating Summons, R2–24–5 of 2000 ('the OS'). On 16 January 2001, the JD obtained an order on the same issues as had been earlier ordered to proceed with trial. The court had also dismissed the JC's application to strike out the OS. Against both decisions, the JC filed the appeals.

[21] On 5 September 2008, the Court of Appeal allowed the appeals by the JC, and had also made an order directing the JD 'to refund to the defendant the aforesaid sum of RM2,274,151.42 with interest at 8%pa with effect from 28 February 1997 to the date of realisation …'.

[22] Against this decision dated 5 September 2008, the JD had filed an application for leave to appeal to the Federal Court. On 10 August 2009, the application for leave was dismissed by the Federal Court. Thus, the judgment dated 5 September 2008 is final, legally binding and enforceable against the JD.

[23] Despite losing the leave application in the Federal Court, the JD went on to file a motion in the Court of Appeal to remove part of the order dated 5 September 2008 directing him to return the sum of RM2,274,151.42 with interest to the JC. The JD's application was dismissed by the Court of Appeal on 14 January 2010.

[24] So, what I have before me is an order of the Court of Appeal dated 5 September 2010. By the principle of stare decisis, I am bound by the judgment of the Court of Appeal dated 5 September 2010. I do not have the jurisdiction to ascertain whether a judgment of a superior court is null and void. It is clearly misconceived for the JD to attack the judgment of the Court of Appeal in order to avoid the repercussions arising from the BN. He could have avoided these bankruptcy proceedings if he had just paid back the taxpayers' money.

[25] For the reasons enumerated above, the JD's appeal in encl (33) is dismissed with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor